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Before the
Federal Communications Commission
Washington, DC 20554

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

REPLY COMMENTS OF E.SPIRE COMMUNICATIONS, INC. AND INTERMEDIA COMMUNICATIONS INC.

Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Fifth Floor
Washington, DC 20036
(202) 955-9600

Counsel for
E.SPIRE COMMUNICATIONS, INC. AND
INTERMEDIA COMMUNICATIONS INC.

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e.spire Communications, Inc. and Intermedia Communications Inc. (the "Joint Commenters"), by counsel, hereby submit these reply comments to the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

As the Joint Commenters noted in their initial comments, this proceeding provides the Commission a tremendous opportunity to articulate clearly the technology-neutral underpinnings of the Communications Act as the Commission re-visits its initial unbundled network element ("UNE") determinations. Since the *Local Competition First Report and Order*,[2] the Commission has held steadfast to its goal of opening all markets – in particular, local markets – to robust competition. As a general matter, competitive local exchange carriers ("CLECs") have supported the Commission's efforts to implement the local competition provisions of the Act in a technology-neutral way to ensure that the strength of CLEC business plans – and not regulation – will be the primary determinant of the success of any new entrants.

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Second Further Notice of Proposed Rulemaking* (rel. Apr. 16, 1999) (*"FNPRM"*).

2 *Implementation of the Local Competition Provisions in Telecommunications Act of 1996,* CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition First Report and Order*").

Based on the record developed in this proceeding, the Joint Commenters recommend that the Commission take four main steps to further the pro-competitive work that the Commission has accomplished over the last three years. First, the Commission should establish national unbundling requirements pursuant to its statutory authority to implement the Act. Second, in accordance with the Supreme Court's directive to add a limiting factor to the Act's unbundling requirements, the Commission should adopt the interchangeability approach for the "necessary" and "impair" standards, which was outlined by the Association for Local Telecommunications Services ("ALTS"). The Commission should reject incumbent local exchange carrier ("ILEC") calls for use of the "essential facilities" doctrine. Third, the Commission should reaffirm that ILECs must provide requesting CLECs with UNE combinations that ILECs utilize in their own networks. Fourth, the Commission should define UNEs to support advanced services in accordance with the Act's technology-neutral foundation and section 706 mandate. By taking these actions, the Commission will go a long way towards ensuring the ultimate success of the Act.

I. THE COMMISSION SHOULD ADOPT NATIONAL UNBUNDLING REQUIREMENTS

In the *FNPRM*, the Commission tentatively concluded that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis."[3] This tentative conclusion is wholly consistent with the Commission's findings in the *Local Competition First Report and Order*, where the Commission concluded that national rules

[3] *FNPRM* at ¶ 14. In addition, the Commission properly observed that nothing in the Supreme Court's recent decision calls into question the Commission's establishment of minimum national unbundling requirements. *Id.*

would: "reduce the number of issues states must consider in arbitrations...; reduce the likelihood of litigation regarding the requirements of section 251(c)(3)...; and provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital."[4] The overwhelming majority of the record evidence in this proceeding supports the Commission's tentative conclusion and its initial rationale for promulgating national rules. Moreover, under the Commission's national unbundling rules, CLEC investment in facilities has increased – not decreased – demonstrating that ILEC concerns about the "dangers" of national unbundling rules are unfounded. Finally, the Commission should reject ILEC efforts to define sub-state unbundling standards, as doing so would result in a patchwork of unbundling obligations, which would directly contradict the Commission's conclusions in the *Local Competition First Report and Order*.

A. The Record Supports the Commission's Call for National Unbundling Requirements

As ALTS indicated, "by identifying a specific list of network elements that must be unbundled and applied uniformly in all states and territories [the Commission] would best further the 'national policy framework' established by Congress to promote local competition."[5] The Supreme Court has expressly endorsed the Commission's authority to use national standards to implement the Act, and the national minimum standards approach to unbundling received widespread support from commenting state commissions and

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4 *Local Competition First Report and Order* at ¶ 242.

5 ALTS at 4 (citation omitted).

competitive carriers. Accordingly, the Joint Commenters submit that the Commission should adopt its tentative conclusion and repromulgate national unbundling standards.

As a threshold matter, a national list of UNEs is by no means inconsistent with the Supreme Court's opinion in *AT&T*,[6] as Ameritech suggests.[7] Indeed, the opposite is true. In *AT&T*, the Supreme Court found that section 201(b) of the Act authorizes the Commission to establish national rules to implement the local competition provisions of the Act, which include section 251(d)(2)'s unbundling requirements. As the Court noted, "the grant in [section] 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include [sections] 251 and 252, added by the Telecommunications Act of 1996."[8] Moreover, the Court noted, the local competition provisions of the Act apply to intrastate service and confer jurisdiction to the Commission over related intrastate matters.[9] Hence, the Supreme Court's opinion in *AT&T* supports the Commission's tentative conclusion that it should continue its practice of utilizing national unbundling rules.

Many state commissions support Commission-established national unbundling rules for the same reasons the Commission adopted a national minimums approach in 1996. Echoing Commission statements from the *Local Competition First Report and Order*, the Illinois Commerce Commission stated that national unbundling requirements "would assist the states in conducting arbitrations under [section] 252(b) and reduce the likelihood of litigation regarding

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6 *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*AT&T*").

7 Ameritech at 53, 58-59.

8 *AT&T* at 730.

9 *Id.*

the requirements of [section] 251(c)(3)."[10] Similarly, the California Public Utility Commission commented that a national list of UNEs "would allow multi-state competitors to create a national business plan, with the certainty of knowing that a discrete set of network elements will be available in all states."[11] At bottom, state commissions largely support the view that a national approach to UNEs "is essential in making the unbundled network element [market entry] strategy viable."[12] For these reasons, the Commission should continue its national minimums approach to unbundling.

Competitive carriers wholly support the Commission's tentative conclusion to reinstate national unbundling rules. As MGC Communications noted, national uniform minimum unbundling standards remain essential to the development of local competition.[13] Similarly, Net2000 indicated that "[u]nder a nationwide list of available UNEs, CLECs can formulate a single business plan that relies on one or more of those UNEs, knowing that the plan can be implemented in a number of markets."[14] Indeed, as expressed by CoreComm Limited, failure to establish a national floor of UNEs "would be disruptive to carrier business plans and generate uncertainty in the early competitive stages of the local exchange market by adding operational complexity and impeding carriers' plans to expand geographically."[15]

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10 Illinois Commerce Commission at 2.

11 California Public Utility Commission at 2.

12 Iowa Utility Board at 2.

13 MGC at 4-5.

14 Net2000 at 4.

15 CoreComm Limited at 9.

B. As Demonstrated by the ILECs, the Commission's Uniform National Unbundling Rules Have in No Way Slowed CLEC Investment – Indeed the Commission's Uniform National Unbundling Rules Have Spurred Investment

One recurring theme of the ILEC comments is that uniform national unbundling rules would discourage CLEC investment in facilities.[16] At the same time, however, the ILECs argue that CLECs have invested so much in their own facilities that certain UNEs should not be available.[17] The Joint Commenters submit that the ILECs prove too much, and indeed, the record indicates that the Commission's uniform national unbundling rules have spurred and not dampened investment in facilities. Thus, the Commission should stay true to its present course and adopt uniform, national unbundling minimums.

As noted previously, one of the driving forces of the Commission's initial decision to establish uniform national unbundling rules was a desire to "provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital."[18] This strategy has worked – CLECs have raised capital, and as noted by the ILECs, CLECs have used this capital to deploy their own facilities when it makes economic sense to do so. For example, the availability of the unbundled switching UNE has by no means discouraged CLECs, such as the Joint Commenters,

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16 *See e.g.*, GTE at 16 ("UNE sharing requirements significantly diminish the incentives for both competitors and incumbents to innovate through investment in their own facilities.").

17 *See e.g., id.* at 9 ("In the Dallas/Fort Worth area, for example, over 97 percent of GTE's customers, including both business and residential customers, are within 1,000 feet of a CLEC's fiber, and fully 91 percent of GTE's business and residential customers are within 18,000 feet of a CLEC's switch.").

18 *Local Competition First Report and Order* at ¶ 242.

from deploying their own switching facilities. As GTE notes, "[a]s of March 1999, CLECs had deployed a total of 724 switches, with 167 different CLECs placing switches in 320 different cities."[19]

Interestingly, the ILECs' comments assume that CLECs would prefer to use ILEC facilities than to self-provision or purchase wholesale facilities from non-ILEC suppliers. As the record indicates, the exact opposite is true. CLECs would prefer not to deal with the ILECs. However, wholesale alternatives to the ILECs' embedded loop and transport networks simply do not exist in any meaningful way, leaving CLECs to rely on access to the ILECs' networks, if CLECs are to have any meaningful opportunity to develop widespread product offerings.[20]

C. The Commission Should Reject as Unmanageable ILEC-Proposed Sub-State Unbundling Requirements

In the initial comment round of this proceeding, the Joint Commenters and the majority of the competitive industry proffered a simple, straightforward process for establishing and retiring UNEs. In a nutshell, CLECs generally proposed having the Commission establish a national minimum list of UNEs that the states could supplement based on state-specific needs. To remove UNEs from the national list, an ILEC would need to petition the Commission for a waiver of the unbundling requirement (1) for an entire state, (2) for an entire ILEC service territory, or (3) for the nation as a whole. The Joint Commenters and several other commenting

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19 GTE at 55.

20 On a related point, as the Commission is well aware, the "negotiation" process for adding new UNEs through interconnection agreements has been largely ineffective, resulting in non-stop arbitration and litigation of these "contracts." This is not surprising, however. Contract law is based on the premise of mutually beneficial exchange, and it is hornbook law that if one party to a contract does not want the deal, then the contract is destined for trouble.

parties indicated that the process proposed would largely mirror the existing *status quo* and also provide the ILECs with a fair opportunity to modify their unbundling obligations over time.

In sharp contrast to the proposals proffered by CLECs, the ILECs introduced numerous administratively burdensome and downright Byzantine proposals, some of which include:

- Ameritech: Interoffice transport should not be required to be unbundled (1) in any wire center serving 40,000 or more lines with existing collocation, or (2) in any central office with collocation if competitive interoffice transmission facilities have actually been deployed. Local Loops should not be required in wire centers serving 40,000 or more lines and in which alternative loop facilities have been deployed.[21]

- Bell Atlantic: Interoffice transport should not be required in any area where at least one carrier has deployed its own network and has collocated with Bell Atlantic.[22] Local Loops at the DS1 level and above should not be available in any area where at least one carrier has deployed its own network and has collocated its own transmission equipment in a BA central office.[23]

- BellSouth: Local markets should be grouped into three zones, with separate UNE determinations in each zone.[24] In areas where cable telephony is offered, loop UNEs should be eliminated.[25]

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21 Ameritech at 5-6.

22 Bell Atlantic at 31.

23 *Id.* at 39.

24 BellSouth at 29. Of course, BellSouth's rate zone definitions assume exactly what BellSouth seeks to prove. For example, "Zone 1," by definition, is an area where competitive wireline providers are operating, and in these areas, no unbundling is required, according to BellSouth. "Zone 2," by definition, is an area with few wireline competitors but "wireless options" (whatever this means) are available, and, again, no unbundling is required, according to BellSouth. "Zone 3," by definition, has essentially no wireline or wireless alternative, and here BellSouth believes that unbundling should be a question of fact, to be determined on a case-by-case basis. *Id.* at 53.

25 *Id.* at 66.

- GTE: ILECs should only have to unbundle interoffice transport between central offices with less than 15,000 access lines.[26]

- SBC: When considering whether a network element must be unbundled, the Commission must evaluate on a market-by-market basis: (1) the extent of competing carriers' facilities; (2) how readily competing carriers could build-out or add to those facilities through additional purchases of equipment or services from sources other than the ILECs; (3) the extent to which sources other than the ILECs do, or potentially could, supply services or equipment that are viable substitutes for the ILECs' network elements; and (4) how much it would cost – on a forward-looking, long-run incremental basis – for a competitive carrier to obtain a particular element from a source other than an ILEC.[27]

In sum, the ILECs propose a case-by-case, central office-by-central office approach. There should be little doubt that setting such a course would result in litigation, not local competition.

D. In Addition to Adding Needless Complexity into the Unbundling Process, the ILECs' Proposals Demonstrate a Fundamental Lack of Understanding of How CLECs Use UNEs

As noted above, ILECs seem to view a single collocation arrangement in a central office as a "silver bullet" for eliminating their obligation to provide unbundled loops and transport to CLECs. Some ILECs suggest that they should not have to provide unbundled loops from dense wire centers (those with 40,000 or more access lines) to certain classes of customers after a CLEC has established a collocation arrangement. These same ILECs argue that they

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26 GTE at 57. As evidence of the difficulties with the fact-based inquiries proposed by GTE and others, Intermedia notes that it has two Class 4/5 switches in the Dallas Metroplex, and not four Class 4/5 switches as alleged by GTE. *Id.* at 41.

27 SBC at 20. Moreover, for loops, SBC proposes a "self-executing sunset," whereby SBC's obligation to unbundle local loops serving customers with 20 or more lines in central offices with 40,000 or more access lines would evaporate. *Id.*

should not have to provide transport from dense wire centers in which CLECs are collocated. These proposal demonstrate that ILECs fundamentally misunderstand how CLECs use UNEs.

While the ILECs produce reams of information regarding CLEC facilities rollouts, they fail to produce a shred of evidence to suggest that wholesale markets for loops or transport exist. Regarding the loop proposals, the unstated assumption made by the ILECs is that CLECs are extending their own loops to large customers and to customers in multi-tenant dwelling establishments – whether a wholesale market exists is not discussed, because one does not exist. As for the transport proposals, the ILECs assume that CLECs have extended networks of collocations cages that CLECs need to connect – again, whether a wholesale market exists is not discussed, because one does not exist.

Moreover, on their face, the ILECs' assumptions fail to comport with reality. CLECs do not extend their own loops (as opposed to UNE loops obtained from ILECs) from CLEC collocation arrangements. Rather, CLECs can only run loops from their own switches, which are not collocated. As for unbundled transport, the ILECs' unlawful refusal to provide combinations of UNEs, such as the loop and transport combinations that ILECs use for their retail customers, has severely restricted the utility of the Commission's unbundled transport UNE. ILECs simply don't get it.

In addition, the ILECs' collocation-centric policies for eliminating UNEs would produce an absurd result. The Act indicates that one of the express purposes of collocation is for providing CLECs with "access to unbundled network elements at the premises of the local exchange carrier."[28] However, under the ILEC proposal, as soon as a CLEC collocated to access

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[28] 47 USC § 251(c)(6).

UNEs, these same UNEs would become unavailable. For all these reasons, these ILEC proposals run directly contrary to the Act's unbundling and collocation provisions, and thus must be rejected by the Commission.

Without question, the ILECs are seeking to create an unbundling regime that is as complex as possible. Complexity means litigation, and litigation means expense and delay, both of which favor the ILECs. As such, the Commission should reject the ILEC sub-state unbundling proposal as contrary to the Commission's express desire to minimize litigation and promote regulatory efficiency and certainty throughout the nation.

II. THE COMMISSION SHOULD ADOPT THE ALTS PROPOSAL FOR DEFINING THE "NECESSARY" AND "IMPAIR" STANDARDS AND REJECT ILEC CALLS FOR UTILIZING THE "ESSENTIAL FACILITIES" DOCTRINE

Initial comments provided by numerous parties support the ALTS proposal for defining the "necessary" and "impair" standards. By focusing on "interchangeability" as a primary criterion, the ALTS proposal meets the Supreme Court's directive to the Commission by properly considering the availability of network element substitutes outside of the ILECs' networks. Despite ILEC claims to the contrary, neither the Congress nor the Supreme Court endorsed the so-called "essential facilities" doctrine of antitrust law as the touchstone for evaluating whether an ILEC must make available a network element.[29] Contrary to the ILECs' suggestion, the "necessary" and "impair" standards of the Act do not permit ILECs to discriminate against CLECs based on the status of a CLEC's end-user customer. For all these

[29] In fact, the Supreme Court considered but did not endorse the "essential facilities" doctrine. Instead, the Court stated that the Commission should merely review its "necessary" and "impair" rules and come up with a limiting standard. *See AT&T*, 119 S.Ct. at 734-35.

reasons, the Commission should endorse the ALTS interchangeability approach and reject the ILECs' essential facilities approach.

A. The ALTS Proposal for the "Necessary" and "Impair" Standards Satisfies the Supreme Court's Directive to the Commission

As ALTS and others indicated in initial comments, section 251(d)(2) contemplates two types of UNEs – proprietary[30] and non-proprietary. For proprietary UNEs, the Commission must determine whether CLEC access to the UNE is "necessary," and for nonproprietary UNEs, the Commission must determine whether failure to obtain access would "impair" the ability of a CLEC to provide telecommunications services.[31] Thus, the difference between "necessary" and "impair" appears fundamentally to be one of degree, with "necessary" presenting a slightly higher hurdle for unbundling "proprietary" elements.

This distinction recognizes that in some very narrow instances, an ILEC may not have to offer a "proprietary" telecommunications application as a UNE if a CLEC could reproduce the ILEC application relatively easily. However, if failure to gain access to a "proprietary" UNE would result in a material loss of functionality to CLECs (*e.g.*, access to information needed to electronically bond OSS systems), then it would be "necessary" for the CLECs to have access to the item as a UNE. For non-proprietary network elements, the "impair"

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30 Even GTE admits that "none of the original UNEs defined in Rule 319" are proprietary in nature. GTE at 26. That said, the Joint Commenters note that they support the view expressed by Net2000 that the Supreme Court did not question the Commission's interpretation of the term "proprietary," and as such, the Commission should maintain its existing definition of "proprietary" and its previous decisions as to whether a UNE is proprietary. Net2000 at 9.

31 47 U.S.C. § 251(d)(2) (emphasis added).

standard is invoked. Under the "impair" standard, the Joint Commenters agree with ALTS and others that non-proprietary network elements must be made available to CLECs unless a ubiquitous, interchangeable substitute for the ILEC UNE is readily available at a reasonable price.

B. The Supreme Court Did Not Endorse Use of the "Essential Facilities" Doctrine as a Proxy for the Act's "Necessary" and "Impair" Standards

Contrary to the interchangeability approach supported by ALTS, the Joint Commenters, and others, the ILECs request that the Commission adopt an "essential facilities" approach to defining UNEs.[32] However, the ILECs' suggestion that the Supreme Court adopted the "essential facilities" doctrine or suggested that the Commission should do so are entirely unfounded. As AT&T noted, the Supreme Court in no way determined that section 251(d)(2) codifies the "essential facilities" doctrine.[33] Instead, the Court merely instructed the Commission to apply "*some* limiting standard" in determining what UNEs must be made available under section 251(c)(3), and the Court specifically declined to adopt the ILECs' "essential facilities" argument.[34]

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32 *See e.g.,* Ameritech at 15 ("The Supreme Court adopted the key precepts of the 'essential facilities' doctrine and the Commission must be guided by its requirements."); *see also* GTE at 15 ("Within the body of federal competition law, the "essential facilities" doctrine is the only relevant line of authority analogous to section 251(d)(2) under which an incumbent firm can be compelled to share its facilities with competitors."); *see also* U S WEST at 16 ("The Commission should look to the essential facilities doctrine as a guide to determining the circumstances under which compulsory sharing is likely to serve or disserve the public interest.").

33 AT&T at 47.

34 *AT&T,* 119 S.Ct. at 734.

Congress' decision to use the "necessary" and "impair" standards rather than an "essential facilities" standard in drafting section 252(d)(2) cuts deeply against the ILECs' argument. There is no doubt the "essential facilities" doctrine is a widely known – if not widely supported – tenet of antitrust law, and had Congress intended to invoke the "essential facilities" doctrine, it could have easily stated so expressly. Indeed, Congress simply could have noted that the ILECs' networks are subject only to the antitrust laws, but Congress wanted this Commission – and not the antitrust laws – to ensure the development of robust competition in telecommunications markets. As Level 3 explains, "the essential facilities doctrine is inappropriate to define necessary and impair, because Congress sought to wrest telecom policy from antitrust courts and return it to the Commission...."[35]

At bottom, the ILECs have ignored the Supreme Court's opinion and instead have elected to rely instead on a selective reading of Justice Breyer's partial dissent and partial concurrence.[36] As AT&T points out, this reliance is misplaced as Justice Breyer simply stated that he believed that section 252(d)(2) required that the Commission give a "convincing explanation" of why unbundling should take place in those instances "where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available."[37] While it appears that the ILECs read Justice Breyer's separate opinion carefully, the ILECs failed to note Justice Breyer's statement that the Supreme Court "has never adopted" the essential facilities doctrine.[38]

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35 Level 3 at 9-10.

36 *E.g.,* BellSouth Comments at 7-9; Bell Atlantic Comments at 10, 43.

37 AT& T Comments at 47-48 (citation omitted).

38 *AT&T*, 119 S.Ct. at 753 (Breyer, J., concurring in part and dissenting in part).

C. The Commission Should Reject ILEC Efforts to Use the "Necessary" and "Impair" Standards to Discriminate Among CLECs Based on the Status of the End User Served

The Commission should reject expressly the ILECs' contention that the Act's "necessary" and "impair" standards should be used to discriminate against end users, based on the type of end user a CLEC wishes to serve. For example, under GTE's proposal, CLECs would lack the ability to purchase unbundled loops for customers with 20 or more lines, for residential customers in multiple dwelling units, or for residential customers in new housing developments.[39] Similarly, U S WEST argues that the Commission should mandate CLEC self-provisioning for local loops having a capacity of DS1 or above.[40] However, the Act in no way suggests that competition should be available to some end users, but not others.

As the Joint Commenters noted in initial comments, the Act was designed to be technology neutral, such that market forces, rather than regulatory distinctions would drive the advancement of the nation's communications infrastructure. In the words of the Commission, "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[41] It is vital in this proceeding that, in adopting a nationwide list of UNEs, the Commission make extremely clear that any sort of use restrictions on UNEs based on the status of the end user will simply not be tolerated. This is particularly

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39 GTE at 95.

40 U S WEST at 39.

41 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *First Report and Order, and Further Notice of Proposed Rulemaking* at ¶ 11.

critical because some state commissions and ILECs continue to take the position that they may restrict CLEC use of UNEs depending on the status of the CLEC customer or the service used by the CLEC customer.

The Joint Commenters respectfully request that the Commission reaffirm that CLECs may use UNEs to provide *any* telecommunications service that a CLEC wishes to offer. Moreover, the same performance standards must apply to a UNE regardless of how it is used by a CLEC. Any other result would have the ILECs and regulators – not the marketplace – pick competitive winners and losers.

III. THE RECORD SUPPORTS THE VIEW THAT THE COMMISSION SHOULD REAFFIRM THAT ILECs MUST OFFER CLECs UNE COMBINATIONS THAT ILECs UTILIZE IN PROVIDING SERVICE TO END USERS

In the *FNPRM*, the Commission recognized that "[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress's objective of promoting rapid competition in the local telecommunications market."[42] As the Joint Commenters noted in initial comments, "the Commission is fully empowered to require ILECs to provide UNE combinations."[43] Supporting this view, the Supreme Court has noted that section 251(c)(3) "does not say, or even remotely imply, that elements must be provided [in discrete pieces] and never in combined form."[44]

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42 *FNPRM* ¶ 2.

43 Joint Commenters at 9.

44 *AT&T* 119 S. Ct. at 737.

Without combinations, ILECs will have an unfettered ability to impair CLEC provisioning of all telecommunication services, especially advanced services. Thus, in accord with the Supreme Court's decision, the Commission should affirm that: (1) the ILECs' section 251(c)(3) unbundling obligation requires the provision of UNEs in combination, and (2) Commission Rule 51.315(b) requires the ILECs to provide EEL combinations[45] to CLECs.

A. As the Record Indicates, the Commission's Existing Rules Require ILECs to Offer UNE Combinations that the ILECs Utilize in Their Retail Operations

The Commission should reaffirm that under Rule 51.315(b), ILECs must make available to CLECs combinations of UNEs that the ILECs make available to their end users, including EEL combinations. In its provision of data services to end users, ILECs use combinations of loops, transport, and multiplexing to provide connectivity. For example, many ILECs (including Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and U S WEST) provision DS-1 services – as native DS-1 or as T-1 service over HDSL – and other data services (*e.g.*, Frame Relay and ATM) to their retail end users using loop/transport combinations. These data circuits are the functional equivalent of EELs, and the ILECs' collective refusal to provide similar technically feasible combinations to CLECs contradicts section 51.315(b) of the Commission's rules as well as the nondiscrimination requirement of section 251(c)(3) of the Act.

As stated by Excel, "[i]n order to prevent ILECs from defeating entrants' legal entitlement to pre-existing UNE combinations under Rule 315(b), the Commission should clarify that the rule broadly entitles an entrant to provide any service to any customer through a UNE

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[45] An EEL is a local loop, transport, and in some cases, multiplexing combination.

combination if the ILEC provides or uses that combination anywhere in its local network." NEXTLINK similarly agrees that the reinstatement of Rule 315(b) requires ILECs to make UNE combinations available and that the Commission should confirm that ILECs cannot limit CLEC use of UNE combinations.[46]

B. The Commission Should Reject ILEC Efforts to Eviscerate Unbundling Obligations through Offering "Services" in Lieu of UNEs

In initial comments, the Joint Commenters noted that many CLECs have been forced to purchase special access circuits in order to obtain reasonable deployment intervals for facilities theoretically available as UNEs under interconnection agreements, but plagued by ILEC provisioning delays.[47] Comments by the ILECs indicate that several ILECs have made a conscious decision to try to eviscerate their unbundling obligations by offering "services" – such as special access – in lieu of UNEs. Such practices directly contradict section 251(c)(3) of the Act, and therefore, the Commission should clarify that ILECs may not use special access or similar service offerings to undermine the unbundling provisions of the Act.

GTE, for example, argues that because special access has "the same functionality as an unbundled loop combined with transport" and because "CLECs can create any combination of elements by ... purchasing services that provide similar functionality, there is no basis for concluding that a CLEC would be impaired if ILECs do not combine network elements on [a CLEC's] behalf."[48] "Collocating CLECs," GTE continues, "can purchase transport capacity

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46 NEXTLINK at 41-44.

47 Joint Commenters at 34.

48 GTE at 58.

directly from the ILEC through special access or expanded interconnection agreements – a substitute for unbundled ILEC transport."[49] U S WEST similarly believes that because CLECs now serve [high capacity (DS1 and above)] customers through special access services available through ILEC retail tariffs, the Commission should not require ILECs to unbundle high-capacity loops.[50]

Without question, at least some ILECs are attempting to place CLECs in a box – purchase UNEs and receive poor service, or purchase special access and receive better service. Of course, as "services," the ILECs do not offer cost-based pricing, as required by the Act and the Commission's rules. Without cost-based pricing, unbundled access would become meaningless, as the whole purpose of unbundling is to permit competitors to enter local markets with a cost structure that mirrors that of the ILECs. If the Commission hopes to maintain UNEs as a viable entry strategy as contemplated by Congress, then the Commission must state without question that it will not tolerate efforts by ILECs to eviscerate the Act's unbundling requirements with services arrangements, such as special access.

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49 *Id.* at 61.

50 U S WEST at 39 ("CLECs already can and do serve [high capacity] customers by obtaining ILEC private line and special access interconnection pursuant to federal and state tariffs.").

IV. THE RECORD SUPPORTS THE VIEW THAT THE COMMISSION SHOULD DEFINE UNEs TO SUPPORT ADVANCED SERVICES IN ACCORDANCE WITH THE ACT'S TECHNOLOGY-NEUTRAL UNDERPINNINGS AND THE SECTION 706 MANDATE

GTE argues that mandating access to any new unbundled network elements would violate the Act.[51] This, and similar ILEC statements directly contradict the technology-neutral underpinnings of the Act and the Commission's express findings with respect to section 706 of the Act. The Commission has recognized that in order for advanced telecommunications and information technologies to be made available to all Americans, as section 706 requires, the Commission's rules must maintain the flexibility to promote the deployment of those technologies.[52] The Commission stated specifically that "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[53] Moreover, the Commission recently concluded in its *Advanced Services Collocation Order* that in order to encourage CLEC deployment of advanced services, its local competition rules must "apply to all telecommunications services, whether traditional voice services or advanced services."[54]

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51 GTE at 72.

52 *See Joint Explanatory Statement of Managers,* S. Conf. Rep. No 104-230, 104th Cong. 2d Sess. 1 (1996).

53 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* at ¶ 11 (rel. Aug. 7, 1998).

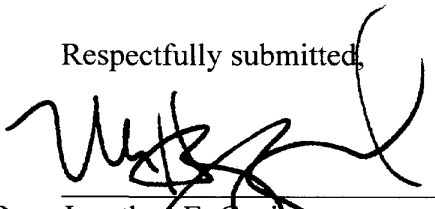
54 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *First Report and Order, and Further Notice of Proposed Rulemaking* at ¶ 23 (rel. Mar. 31, 1999).

The record of this proceeding clearly demonstrates that in order for CLECs to continue leading the drive toward the deployment of advanced services on a widespread basis, the Commission should define UNEs to support such deployment, and the Commission should reject arguments, such as those made by GTE, which seek to freeze in time the applicability of the Act.

CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully submit that the Commission should adopt a nationwide list of minimum UNEs consistent with these comments. In addition, the Commission should also promulgate UNE rules consistent with the positions advocated herein.

Respectfully submitted,



By: Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Fifth Floor
Washington, DC 20036
(202) 955-9600

Counsel for
E.SPIRE COMMUNICATIONS, INC. AND
INTERMEDIA COMMUNICATIONS INC.

JUNE 10, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing JOINT COMMENTS OF e.spire COMMUNICATIONS, INC. AND INTERMEDIA COMMUNICATIONS INC. were served this 10th day of June 1999, by hand on the following:

Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jake Jennings
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Mattey
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Claudia Fox
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christopher Libertelli
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Valerie Yates
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael Pryor
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ITS
1231 20th Street, N.W.
Washington, D.C. 20036

Arethea P. Johnson